C.A. No. 02924

NOVA SCOTIA COURT OF APPEAL

Hallett, Hart and Matthews, JJ.A.
Cite as: Kynock v. Bennett, 1994 NSCA 114

BETWEEN:

VERNON KYNOCK Appellant - and - SHIRLEY BENNETT, TIM BENNETT, WENDY BENNETT, WILLIAM T. BENNETT, PAUL CALNEN, TANYA CALNEN, RANDALL B. COREY, ROXANNE COREY, MIKE D'AMOUR, PAMELA D'AMOUR, BRIAN F.S. DILLON, CAROL DILLON, DOROTHY E. EVANS, JOYCE I. EVANS, KEN FISHER, MARGARET FRASER, DEREK FUDGE, PATRICIA FUDGE, JANE INNES, JIM INNES, PATTI HAMBLEM, CATHERINE HARNISH, STEPHEN HARNISH, DOUGLAS HAVERSTOCK, ELLEN HAVERSTOCK, MABEL (JOYCE) HAVERSTOCK, PETER A. HAVERSTOCK, TIMOTHY HAVERSTOCK, HAROLD A. HILTZ, HAROLD LONG, DONNA MASON, JANICE NEWELL, MICHAEL NEWELL, BETTY RYAN, BETTY LOU SHIELDS, FRANK SHIELDS, JOEY SHIELDS, ROSELINE SHIELDS, BONNIE P. SMITH, GRANVILLE SMITH, LEETA CATHERINE SMITH, LENA SMITH, MARY SMITH, RAYMOND SMITH, THOMAS SMITH, ELIZABETH STACEY, JULIAN STACEY, DIANNE VANVESSEM, BARBARA VERGE, GERALD VERGE, ROBYN WALKER, LAWRENCE WALKER, DEBORAH WELTZ, GERALDINE WELTZ, THOMAS WELTZ, WALTER WELTZ, JENNIFER WOOD, RICHARD WOOD, GARY YOUNG and LYNN YOUNG Respondents	)	Peter A. McInroy for the Appellant Paul B. Miller for the Respondents Appeal Heard: February 14, 1994 Judgment Delivered May 25, 1994

THE COURT: Appeal allowed with costs to the appellant in the amount of $3,000 plus disbursements per reasons for judgment of Hallett, J.A.; Hart and Matthews, JJ.A. concurring.

HALLETT, J.A.

This is an appeal from a decision of the Nova Scotia Utility and Review Board which allowed

an appeal from a decision of the Council of the Municipality of the County of Halifax authorizing the County to enter into a development agreement with the appellant respecting the development and operation of a gravel pit quarry on his property on the Hammonds Plains Road in District 18. On the appeal the Board was required by reason of **s. 78(4)** of the **Planning Act**, R.S.N.S. 1989, Chapter 346 to determine if the proposed agreement was consistent with the intent of the municipal planning strategy. **Section 78(6)** of the **Act** provides:

> " The Board shall not interfere with the decision of the council unless the decision cannot reasonably be said to be consistent with the intent of the municipal planning strategy."

The Board concluded that the Council's decision to authorize the entry into the development agreement could not reasonably be said to be consistent with the intent of the municipal planning strategy for District 18. The Board reversed the decision of Council.

History of the Proceedings

The entry into the development agreement had been approved by Council following a public meeting at which proponents and opponents of the proposal made representations.

On March 17th, 1992, several months prior to the public meeting, officials of the Department of the Environment had advised the municipality that in their opinion, based on the technical information submitted by the appellant, they believed the environmental impacts of the quarry were "mitigable" and that the quarry could co-exist with the community of Hammonds Plains. The letter stated:

> " Our Department has completed our assessment of Vernon Kynock's proposal to operate a quarry at Hammonds Plains, Halifax County.
>
> Based on the technical information submitted with Mr. Kynock's proposal our Department believes the environmental impacts of this project are mitigable and this quarry can co-exist with the community of Hammonds Plains.

The following is a summary of the items that we would bring to the Minister's attention when he considers this proposal:

1) Removal and crushing of 50,000 tonnes of rock will be conducted between July 1 and August 31 of any year.

2) A pre-blast survey will be required as well as blast monitoring to ensure compliance with our guidelines.

3) All surface water run-off will be monitored on a regular basis.

4) Our Department will require a reclamation plan be submitted along with a security to ensure reclamation is conducted.

5) A legal land survey outlining the area of the proposed quarry will be required.

6) Should water supplies be lost or damaged as a result of extraction of bedrock, the proponent will be responsible for replacement of these supplies.

7) The proponent has been unable to secure 100% of the letters of permission from residences living within 800 metres of the proposed quarry.

As well as considering the above mentioned items the Minister may request the Environmental Control Council review Mr. Kynock's proposal and provide him with recommendations."

We were advised by counsel for the respondents that an application in the nature of *certiorari* is pending before the Supreme Court of Nova Scotia in which the respondents (sixty residents of the area where the proposed quarry is located) allege a breach of natural justice; asserting that they were denied the right to make full representation to Council at the public meeting. This is an issue that the Board quite properly did not deal with and is not relevant to this appeal.

We were also advised by the respondents' counsel that, in his opinion, this appeal is moot as the policy of the provincial government is that permission to proceed with the quarry development will not be granted unless 100% of the residents living within 800 metres of the quarry agree. Some of the respondents live within the 800 metre area. The appellant's counsel takes the position that policies can change and therefore he does not consider the issue moot.

The appeal heard before the Board took a total of 18 days over a period of several months. Extensive evidence was heard respecting the location of a school in relation to the quarry site, the possible presence of Halifax slates in the site, concerns about runoff, dust, noise, truck traffic, damage to wells and foundations, blasting techniques, geological formations, health of children at the school, noise in the school from truck traffic when the windows are open and details of a blast carried out on August 22nd, 1991. The Board also reviewed the County's By-Laws respecting blasting and dangerous materials and reviewed certain provisions of the **Occupational Health and Safety Act**, R.S.N.S. 1985, Chapter 320 and regulations made thereunder. The Board considered the development agreement, the policy of the Municipal Planning Strategy that were relevant to the issues before the Board, problems at other quarries and complaints the residents had with respect to the conduct by the Council of the public meeting and their worries if the quarry operation went ahead.

The Relevant Planning Policies for the Area

The Municipal Planning Strategy for District 18 allows, but not as a right, quarry development in the District; it recognizes that there are valuable quartzite deposits in the area. Policies P-24 and P-121 of the Planning Strategy are the relevant policies that come into play in the consideration of whether the decision of the Council is reasonably consistent with the intent of the municipal planning strategy. Policy P-24 sets out policies to be considered by Council when determining whether or not to enter a development agreement permitting a quarry in the District. Policy P-121 deals with the matters Council is to consider when deciding whether or not to enter a development agreement generally. The quarry is within a mixed use designation. Policies P-24 and P-121 provide as follows:

> " **P-24** Notwithstanding the provisions of Policies P-2 and P-5, it shall be the intention of Council to consider permitting new or expanded facilities associated with extractive operations within the Mixed Use A, B and C Designations according to the provisions of Sections 55, 66 and 67 of

the Planning Act and having regard to the following:

(a) that the proposed facility shall not require access through a residential (R-1, RR-1, R-2, R-3) zone;

(b) that the proposed facility is not located within one half (0.5) miles of a residential (R-1, RR-1, R-2, R-3), or rural residential zone or a mobile home park;

(c) that any building, structure, plant or product stockpile shall not be located within three hundred (300) feet of a watercourse;

(d) that separation distances from lot lines and adjacent development as well as controls on runoff be incorporated in the development agreement;

(e) the provision of a treed, landscaped buffer strip designed to provide a dust and wind break, noise buffer and visual barrier;

(f) hours of operation;

(g) provisions of site rehabilitation; and

(h) provisions of Policy P-121.

P-121 In considering development agreements and amendments to the land use by-law, in addition to all other criteria as set out in various policies of this Plan, Council shall have appropriate regard to the following matters:

(a) that the proposal is in conformity with the intent of this Plan and with the requirements of all other municipal by-laws and regulations;

(b) that the proposal is not premature or inappropriate by reason of:

(i) the financial capability of the Municipality to absorb any costs relating to the development;

(ii) the adequacy of central or on-site sewerage and water services;

(iii) the adequacy or proximity of school, recreation or other community facilities;

(iv) the adequacy of road networks leading or adjacent to or within the

development; and

(v) the potential for damage to or for destruction of designated historic buildings and sites.

(c) that controls are placed on the proposed development so as to reduce conflict with any adjacent or nearby land uses by reason of:

(i) type of use;

(ii) height, bulk and lot coverage of any proposed building;

(iii) traffic generation, access to and egress from the site, and parking;

(iv) open storage;

(v) signs; and

(vi) any other relevant matter of planning concern.

(d) that the proposed site is suitable in terms of the steepness of grades, soil and geological conditions, locations of watercourses, marshes or bogs and susceptibility to flooding."

The reference to **s. 55** of the **Planning Act** in Policy P-24 is a reference to the section of the **Act** that, taken in combination with **s. 38(2)** of the **Act**, permits development by agreement approved by Council provided there is a policy governing the use of a development agreement and that the policy identifies matters that the Council shall consider before approving a development agreement and the development that is subject to the agreement. **Sections 66** and **67** of the **Act** are not relevant to the issues before us. Policy P-24 authorizes the Council to consider permitting quarry operations in a mixed use area. Policy P-121 is a general policy that seems designed to deal primarily with residential and commercial real estate developments although it is worded broadly enough that it is appropriate that it be considered in connection with any development agreement proposal as was done by the Board. In addition, Policy P-24 specifically requires Council to have regard to Policy P-121 when considering whether or not to enter into a development agreement respecting a quarry

operation.

The development agreement approved by Council in this case is comprehensive but apparently not comprehensive enough for the respondents or the Board; the respondents are 60 residents who simply do not want a quarry in the area. Other residents of the area supported the proposed development at the public meeting convened by Council as required under the **Planning Act**.

The appellant argues that the Board greatly exceeded its jurisdiction in considering matters that were not relevant to the issue before the Board. The ultimate issue before the Board was whether the decision of Council was reasonably consistent with the intent of the municipal planning strategy for the district. The appellant further argues the Board, in effect, conducted an environmental assessment hearing which, in the appellant's opinion, is a matter to be dealt with under the environmental legislation and not dealt with by the Board on the appeal under the **Planning Act**.

Scope of Review by the Board and the Court

The scheme of the planning legislation as found in the **Planning Act** was fully discussed in this court's decision in **Heritage Trust of Nova Scotia and Friends of the Public Gardens v. Nova Scotia Utility and Review Board, Brenhold Limited and The City of Halifax**, (1994) 128 N.S.R. (2d) 5. The **Planning Act** clearly puts the primary responsibility for planning with the various municipalities of the Province. Pursuant to the **Planning Act** the Municipality of the County of Halifax developed planning policies which were approved by the Minister. These policies authorize the Council to consider allowing a quarry operation in District 18 by development agreement in accordance with the provisions of the policies.

The Legislature has provided for an appeal to the Board from a decision of a municipality to enter into a development agreement. However, pursuant to **s. 78(6)** of the **Planning Act** the

Legislature limited the power of the Board to interfere with such a decision. The Board purported to apply the test set out in **s. 78(6)** of the **Planning Act**.

There is an appeal to this Court on questions of law or jurisdiction (**Utility and Review Board Act**, R.S.N.S. 1992, c. 11, s. 30). An excellent and authoritative review of the law respecting judicial review of decisions of administrative tribunals is that of Sopinka J. in **United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Limited**, [1993] 2 S.C.R. 216 at pp. 331-341. Although the **Utility and Review Board Act** provides for an appeal to this court, the comments of Sopinka J. as to the approach to judicial review are relevant to the issues raised on this appeal. At p. 331 he stated:

> " The standard of review to be applied to a decision of an administration tribunal is **governed by the legislative provisions which govern judicial review, the wording of the particular statute conferring jurisdiction on the administrative body**, and the common law relating to judicial review of administrative action including the common law policy of judicial deference."

At p. 332 he made a general statement that is applicable to all situations in which a court finds itself reviewing a decision of a tribunal established by statute. Sopinka J. stated:

> " The legislative provisions in question must be interpreted in light of the nature of the particular tribunal and the type of questions which are entrusted to it. On this basis, the court must determine what the legislator intended should be the standard of review applied to the particular decision at issue, having due regard for the policy enunciated by this Court that, in the case of specialized tribunals, decisions upon matters entrusted to them by reason of their expertise should be accorded deference. The statutory provisions to be interpreted in this manner range from "true" privative clauses which clearly and specifically purport to oust all judicial review of decisions rendered by the tribunal (such as that in *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048) to clauses which provide for a full right of appeal on any question of law or fact and which allow the reviewing court to substitute its opinion for that of the tribunal (as in *Zurich Insurance Co. v. Ontario (Human Rights Commission),* [1992] 2 S.C.R. 321)."

The following statement by Beetz J. in **U.E.S. Local 298 v. Bibeault**, [1988] 2 S.C.R. 1048 at p. 1086 is accepted as a correct statement of law respecting judicial review when a court is dealing with an allegation that the tribunal, although protected by a true privative clause, exceeded its

jurisdiction. He stated:

> " It is, I think, possible to summarize in two propositions the circumstances in which an administrative tribunal will exceed its jurisdiction because of error:
>
> 1. if the question of law at issue is within the tribunal's jurisdiction, it will only exceed its jurisdiction if it errs in a patently unreasonable manner; a tribunal which is competent to answer a question may make errors in so doing without being subject to judicial review;
>
> 2. if however the question at issue concerns a legislative provision limiting the tribunal's powers, a mere error will cause it to lose jurisdiction and subject the tribunal to judicial review."

I cite the foregoing solely for the purpose of illustrating that even in the face of a strong privative clause a tribunal cannot misinterpret a legislative provision limiting its jurisdiction and be immune from judicial review.

In the **Bibeault** decision Beetz J. stated at p. 1088 that a court in determining the jurisdiction of a tribunal:

> " examines not only the wording of the enactment conferring jurisdiction on the administrative tribunal, but the purpose of the statute creating the tribunal, the reason for its existence, the area of expertise of its members and the nature of the problem before the tribunal. "

This has become known as the pragmatic and functional approach to judicial review.

Beetz J. went on to state at p. 1090 in **Bibeault** how important it is that tribunals do not exceed their jurisdiction:

> " When an administrative tribunal exceeds its jurisdiction, the illegality of its act is as serious as if it had acted in bad faith or ignored the rules of natural justice. The role of the superior courts in maintaining the rule of law is so important that it is given constitutional protection: *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220. Yet, the importance of judicial review implies that it should not be exercised unnecessarily, lest this extraordinary remedy lose its meaning."

These views were recently confirmed by the Supreme Court of Canada in **Canada (A.G.) v. P.S.A.C.**, [1993] 1 S.C.R. 941 (P.S.A.C. No. 2) where Cory J. stated at p. 961:

> " In summary, the courts have an important role to play in reviewing the decisions of specialized administrative tribunals. Indeed, judicial review has a constitutional foundation. See *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220."

Central to the judicial review process is to ascertain the intent of the legislators as to the extent of the jurisdiction conferred on a tribunal and the extent to which the legislators have limited or expanded the scope of review to be exercised by the courts in their supervisory capacity. It is clear from the case law that different tribunals, when interpreting the law, are accorded different degrees of deference with the labour relations boards being accorded the highest degree (depending on the breadth of a privative clause) and human rights tribunals at the lower end of the scale as they are generally not protected by a privitive clause of any sort and therefore must be subject to the review by the court on a standard of correctness, not reasonability on questions of law. (**Canada (A.G.) v. Mossop**, [1993] 1 S.C.R. 554 at p. 584/585) On questions as to the extent of its jurisdiction, a tribunal must be correct in its interpretation of the statute under which it derives its authority and if it is wrong the courts do not hesitate to interfere even in the face of a strong privative clause (**Canada (A.G.) v. Public Service Alliance of Canada**, [1993] 1 S.C.R. 941.

In this case the appellant asserts that the Board failed to recognize the limits on its powers as contain in **s. 78** of the **Planning Act** and that its decision resulted in the Board having lost jurisdiction or as it is alternatively phrased, exceeded its jurisdiction.

Until December 14th, 1992, appeals from decisions of municipal councils to enter into development agreements pursuant to the authority given councils under the **Planning Act** were made to the Nova Scotia Municipal Board. On that date the **Utility and Review Board Act** came into force. It provides by **s. 3**:

> " The Board of Commissioners of Public Utilities, the Expropriations Compensation Board, the Nova Scotia Municipal Board and the Nova Scotia Tax Review Board are continued as the Nova Scotia Utility and Review Board."

Section 4 of the **Act** provides:

" 4 (1) The Board has those functions, powers and duties that are, from time to time, conferred or imposed on it by

(a) this Act, the *Assessment Act,* the *Deed Transfer Tax Act,* the *Expropriation Act*, the *Gasoline and Diesel Oil Tax Act*, the *Health Services Tax Act*, the *Heritage Property Act*, the *Insurance Act*, the *Motor Carrier Act*, the *Municipal Boundaries and Representations Act*, the *Planning Act*, the *Public Utilities Act*, the *School Boards Act*, the *Shopping Centre Development Act*, the *Tobacco Tax Act*, the *Village Service Act* or any enactment; and

(b) the Governor in Council.

(2) The Governor in Council may assign to the Board the powers, functions and duties of any board, commission or agency and while the assignment is in effect, that board, commission or agency is discontinued and Sections 49 and 50 apply *mutatis mutandis* with respect to that board, commission or agency."

Members of the predecessor boards became members of the Board. While those members of predecessor boards would have developed expertise in the areas regulated by those tribunals on which they previously sat, they would not have expertise in many of the new areas of jurisdiction conferred on them by the coming into force of the **Utility and Review Board Act** on December 14, 1992.

The appeal to the Municipal Board in this matter began on November 16, 1992, and with various adjournments was completed on April 15th, 1993, with a decision being rendered on August 26th, 1993. The 3-person panel of the Board that heard this appeal consisted of the chairman who had been formerly a member of the Municipal Board and two members of the Board had been members of the Board of Commissioners of Public Utilities.

Section 49 of the **Utility and Review Board Act** provides:

" For greater certainty, every matter before a predecessor board immediately before the coming into force of this Act shall be continued

> before the Board and, where any such matter has been heard, in whole or in part, by any members of a predecessor board, it shall be heard by such of those members as are members of the Board."

I assume the parties must have agreed that the Board could be composed of the members of the new Board even though the hearing started before the **Utility and Review Board Act** came into force; the issue was not raised on the appeal.

This Court held in the **Brenhold** decision that **s. 78(6)** of the **Planning Act** clearly imposes a limit on the Board's power to interfere with municipal council's decision to enter into a development agreement. The **Planning Act** deals with planning matters and provides for full participation of the public respecting the development of planning policies for the various districts in the municipality. It provides for participation of the public at hearings leading up to a decision by a municipal council whether or not to enter into a development agreement. The **Act** also provides that persons aggrieved by a decision of a municipal council to enter into a development agreement have the limited appeal to the Board to which I have referred and there is a further appeal from a board decision to this court. Clearly the Legislature did not intend to confer a *de novo* jurisdiction on the Board when hearing an appeal from a municipal council decision to enter into a development agreement. The Board is functioning in a review capacity and is limited by the jurisdiction conferred on it under the **Planning Act**. This is not to say the Board cannot hear evidence but it should confine itself to hearing evidence relevant to the question before it. Had the Legislature intended the Board to be the primary decision-maker with respect to whether or not a development agreement should be entered into by a municipality it would have so provided in the legislation rather than have provided, as it did, that the primary responsibility is with the municipal council for that County.

The Board has not been designated by the Legislature to conduct environmental assessments. Matters relating to the environment are principally governed by the provisions of the **Environmental Protection Act**, R.S.N.S. 1989 Chapter 150 and the **Environmental Assessment Act**, R.S.N.S.

1989, Chapter 149.

The purpose of the **Environmental Assessment Act** is stated in **s. 2** which provides:

" The purpose of this Act is to

(a) protect the environment and quality of life of the people of the Province;

(b) provide for the environmental assessment of undertakings to identify and correct or prevent, early in the planning process, potentially damaging environmental impact and thus avoid considerable costs for the adjustments or remedies which might otherwise be necessary after an undertaking has been completed;

(c) provide for public consultation respecting the potential environmental impact of an undertaking,

through the institution of environmental assessment procedures in respect of an undertaking that may be potentially damaging to the environment."

There are extensive provisions in that **Act** for assessing "undertakings" that have the potential to damage the environment. A quarry is within the meaning of an undertaking as defined in the **Environmental Assessment Act**.

The **Environmental Protection Act** is a companion piece of legislation to the **Environmental Assessment Act**; the purpose of that **Act** is

" to provide for the preservation and protection of the environment."

Section 7 of the **Act** provides as follows:

" 7(1) The Minister may from time to time engage the services of experts or persons having special technical or other knowledge to advise him or to inquire into and report to him on matters within his jurisdiction under this Act.

Section 8 provides that the Minister has the power to control the operation of any undertaking. **Section 9** of the **Act** provides for the establishment of an Environmental Control Council consisting of persons with specialized knowledge in different fields including health, law,

engineering and ecology; the Council is an advisory board.

The **Act** has extensive provisions requiring permits for operation of undertakings and orders can be made by the Minister to require that an undertaking cease operations (ss. 23-26 inclusive).

The members of the Utility and Review Board do not have expertise in environmental matters. The Legislature did not see fit to deal with environmental matters in the **Planning Act** but did see fit to do so under the environmental legislation. The environmental legislation provides for public participation in reviews conducted by the Environmental Control Council although a public hearing is not mandatory for a quarry development such as this which is under 10 acres. The legislation of this Province puts the primary responsibility for matters affecting the environment with the Minister of the Environment, not with municipalities, municipal councils nor with the Nova Scotia Utility and Review Board. That is not to say municipalities shall not have regard for the environment in their planning policies, only that the primary responsibility for the environment is with the Minister of the Environment.

In summary, the Board on an appeal taken under the **Planning Act** from a decision of a municipal council to enter into a development agreement has jurisdiction to deal with planning matters. It cannot interfere with a municipal council decision to enter into a development agreement unless it determines that "the decision cannot reasonably be said to be consistent with the intent of the municipal planning strategy" for the district as spelled out in the planning policies. The jurisdiction of this court is limited by the **Utility and Review Board Act** to questions of law and jurisdiction. This court has a duty to intervene if the Board misinterprets the legislation which confers jurisdiction on the Board and, as a result, exceeds its jurisdiction or if the Board misinterprets the law which it is required to apply in its decision-making process. On these issues the policy of judicial deference does not come into play given the scope of appeal to this Court from a Board decision. The Board's findings of fact within jurisdiction are final and conclusive (**s. 26 Utility and Review Board Act**).

The Issue

The issue on this appeal is whether the Board exceeded its jurisdiction. It is necessary to give consideration to what was relevant for the Board to consider in determining whether the decision of the Council to enter into the development agreement was reasonably consistent with the intent of the planning policies for District 18. In this case it was an exercise that, in my opinion, required little evidence. The Board ought to have been primarily concerned with the relevant policies that were in place in the municipal planning strategy, the staff report recommending that Council enter into the development agreement and the development agreement itself. It was essentially a matter of reviewing the proposed quarry operation and the terms of the development agreement to see if the proposed quarry operation meets the requirements of the policies and in particular to determine whether the controls were in place to reduce conflicts between the quarry and other uses in this mixed use area. The Board does not appear to have approached its task in this manner; rather the Board heard evidence for 18 days of every real or imagined problem that might be associated with the proposed quarry operation. On the basis of the evidence the Board stated that it had concerns and doubts about the merits of the proposal going ahead. With respect, that was not the Board's role. The **Planning Act** prescribes that a municipal council make the decision whether or not to enter into a development agreement; the Board is to carry out a limited review of that decision. The Board should have confined itself to hearing evidence that was relevant to the issue it is directed to decide by **s. 78** of the **Planning Act**. The Board approached its task as if it had the primary responsibility to determine if, in its opinion, there should be a quarry on this site. In proceeding to set aside the decision of Council the Board misinterpreted **s. 78(6)** of the **Planning Act** and thereby exceeded its jurisdiction. I will expand on this.

The Board's principal reasons for allowing the appeal related to Policies P-121(b)(iii) and (d) which required the Council, with respect to development agreements generally, to have regard to the

soil and geological conditions of a site and the proximity of the school to the proposed development.

A review of the terms of the development agreement shows that the matters that Council was to have appropriate regard for were addressed. Policy P-121(d) was addressed in different provisions of the development agreement. Part 4 provides:

" PART 4: MUNICIPAL DEVELOPMENT PERMIT

4.1 Subject to the terms and conditions of this Agreement, the Developer shall apply for and obtain a Municipal Development Permit for the location of a portable rock crusher, the stockpiling of any topsoil, crushed rock, grubbing material, and any other structures or facilities associated with the operation of a Quarry on the Property.

4.2 Prior to the issuance of a Municipal Development Permit by the Development Officer, the Developer shall submit proof of compliance with respect to the following:

(a) a Blasting Permit, in accordance with Part 7 of this Agreement;

(b) a Topsoil Removal Permit, in accordance with Part 8 of this Agreement;

(c) an Excavation Permit, in accordance with Part 9 of this Agreement;

(d) an Industrial Waste Permit from the Department of the Environment for operation of a Quarry on the Property;

(e) a Water Rights Permit from the Department of the Environment for construction of the culvert over Mason Hill Pond Brook, in accordance with Part II of this Agreement; and

(f) a Commercial Access Permit from the Department of Transportation and Communications for the location of the access road, in accordance with Part II of this Agreement.

4.3 A Municipal Development Permit issued pursuant to this Agreement shall be renewed by the Developer on an annual basis prior to the first day of July in any year.

4.4 Prior to the renewal of a Municipal Development Permit, the Developer shall provide the Development Officer with:

> (a) written confirmation from the Engineer that the conditions of Part 6, 7, 8 and 9 of this Agreement were complied with during the preceding year, and that all relevant informational requirements for the upcoming year have been provided; and
>
> (b) written confirmation from the Department of the Environment that the terms and conditions of the Industrial Waste Permit for the Quarry were complied with during the preceding year."

The Board, instead of carefully considering this provision of the development agreement, focused on concerns raised in the evidence adduced by the respondents respecting possible runoffs from Halifax slates and the resultant effect on the environment. The Board stated at p. 29 of its decision:

> " The evidence establishes that there is a major environmental hazard in the vicinity of the proposed quarry. In the Board's opinion it is essential that there be greater assurance than exists at present that Halifax slates will not be exposed by working this quarry. The environmental hazards of such exposure are well-known and costly to repair. This issue is not addressed in the proposed development agreement. The proposed agreement does not require further testing to be done before blasting commences. It does not appear to require any monitoring of rock samples. There is no discussion as to who will pay for any damage caused as a result of exposing the slates.
>
> There are many quartzite sites in the Mixed Use Designations which do not pose the environment hazard that the site may. Clause (d) of Policy P-121 requires Council to have appropriate regard to whether the proposed site is suitable in terms of the geological conditions. Mr. Pyle's report stated that no concerns had been identified. They now have been identified and cannot be ignored. Based on the evidence before the Board, which was not before Council, there has not been sufficient study done to be certain that the site is suitable in terms of its geological conditions. While there was some reliance placed on the fact that the Department of Environment would also be assessing the proposed development, there is still a requirement to consider the matters set out in clause (d). In the Board's opinion, because the evidence was not before it, Council did not have appropriate regard to whether the proposed site is suitable in terms of geological conditions."

The Board stated that the issue of environmental hazards that would be created from the working of the site were not addressed in the development agreement. With respect, that is an error in that the development agreement, in addition to Part 4, provides that the quarry must operate in accordance with municipal and provincial laws; this includes all the provincial laws designed to

protect the environment. These laws are administered by the Department of the Environment. The record shows that the Council had before it the letter from the Department of Environment that stated that the environmental impacts of the quarry were mitigable. The Council was entitled to assume the Department of Environment will properly ascertain if there are real environmental hazards in the operation of the quarry on this site. The environmental legislation primarily imposes these duties on the Minister and not on municipal councils. With the environmental hazards, suspected to be at the periphery of this site yet to be consideration by the Minister under the **Environmental Assessment Act**, it cannot be assumed that there will be an adverse environmental impact if the quarry operates. Nor can it be assumed that if slates are exposed if the quarry goes ahead that the environmental laws will not be enforced. I disagree with the Board's finding that there is "no discussion as to who will pay for any damage caused as a result of exposing the slates". The development agreement provides that Mr. Kynock would be liable under the general provisions of paragraph 3.4 of the development agreement to meet all financial obligations, required to meet all federal, provincial and municipal regulations, by-laws or codes. The Board does not have expertise in environmental matters and was not primarily designated by the Legislature to inquire into potential environmental hazards on an appeal of this nature. The Board lost sight of the fact that the Department of Environment has the primary responsibility to see that the quarry is operated in a manner that complies with the environmental laws of the Province.

Counsel for the respondent referred us to the preamble to Policy P-24 to support his argument that the Board was required to consider the environmental impact of the proposed quarry. The preamble states:

> " Facilities Associated With Extractive Operations - Mixed Use A, B and C Designations.
>
> The Plan Area has large areas of quartzite, granite and slate. Portions of the Mixed Use A, B and C Designations contain significant areas of quartzite, which provides a high quality resource for extractive operations. While there is some support in the Mixed Use Designations for such operations, there is

> also an overriding concern to protect areas of residential and rural residential development. In addition, jurisdiction over these uses, through municipal planning strategies and land use by-laws, is limited. (See Rural Resource Designation, p.64.)
>
> In the past, the Municipality has experienced conflicts between aggregate exploitation and surrounding development. Concerns relate primarily to dust emission and air pollution, on and off site sediment control and the effects on surface and groundwater quality, blasting shocks and noise. Traffic concerns, in particular the large trucks associated with extractive facilities, also raise land use conflicts and safety issues. Areas underlain with slate, when exposed, have the potential to create acid runoff which can destroy fish stocks. Some of these concerns are presently addressed through provincial legislation and municipal by-laws (see Rural Resource Designation, page 64).
>
> Resource development does not have priority in the Mixed Use A, B, and C Designations. However, the occurrence of areas of high quality aggregate deposits within the Designations, combined with large, undeveloped areas, provides justification for the consideration of facilities associated with extractive operations. Specific locational and design controls are required to ensure that potential land use conflicts and environmental hazards will be minimized." [Emphasis mine]

With respect, the Council was required to have regard to those matters set out in Policy P-24 in determining whether or not to approve a quarry operation in a mixed use area. The preamble merely identified what problems have given rise to the need for controls but it is Policy P-24 which spells out the matters that Council is to consider. This includes a consideration of the matters dealt with in Policy P-121. As the preamble notes "some of these concerns are presently addressed through provincial legislation". The provincial legislation requires the Minister of the Environment to protect the environment and the quality of life of the people of Nova Scotia. While Council was properly concerned that the proposed site was suitable in terms of soil and geographical conditions as required by Policy P-121(d), it was entitled to rely on the information before it, including the Department of Environment assessment, and the provisions of the Development Agreement to ensure that the operator would be required to comply with all laws relating to the environment.

The Board's error consisted in its failure to accept the limitations on its power to interfere with a decision of Council. The Board's function was not to determine if a quarry might be

objectionable to the residents or if its operation might violate environmental laws. The latter issue is properly resolved pursuant to the environmental legislation. The appellant has yet before him the hurdle of obtaining the necessary final approvals from the Department of the Environment and if he obtains the necessary permits he must operate the quarry according to provincial environmental laws. It is impossible to read the development agreement in its entirety without concluding that County staff and Council gave due consideration as required by Policy P-121(d) to the concerns with respect to the geological condition of the site. It is relevant to note that after hearing a great deal of expert evidence respecting the possible presence of Halifax slates within the quarry site the Board could not make a conclusive finding that the slates were present. The Board concluded that further study would be required. This points up the folly of the extent of the Board inquiry into an area more properly left to the Department of the Environment which has expertise in the subject and has been designated by the Legislature to have responsibility for assessing undertakings that could impact on the environment. The Board clearly exceeded its jurisdiction by conducting an environmental assessment.

I will review the other provisions of the relevant policies that the Council was to consider. The requirement of Policies P-24(a) and (b) have not been violated. The requirements of Policy P-24(c) to (g) are covered by the development agreement. Policy P-121 deals with general matters. I will specifically comment on the few provisions of Policy P-121 that are relevant to this quarry development and the manner in which the Board dealt with the additional concerns raised by those opposed to the quarry.

As previously noted, the second major reason given for reversing the decision of Council was the Board's conclusion that the proposed quarry is inappropriate given its proximity to the Hammonds Plains Consolidated School. Pursuant to Policy P-121(b) the Council was required to consider this issue. The evidence discloses that the quarry is well back from the Hammonds Plains Road, and at least 1,500 feet, as the crow flies, from the school. A review of the minutes of the

public hearing held on July 27th, 1992, shows that the matter was discussed by the Council. Council was well aware of the location of the school in relation to the proposed quarry. Most of the concerns of the respondents relate to traffic, some to noise, some to dust and safety. One can appreciate their concerns. However, the development agreement addresses these issues. Blasting is limited to summer months when the children are on vacation. The hours of the operation of the crusher are limited to the months of July and August and between 7 a.m. and 7 p.m. Monday to Saturday (Paragraphs 6.1 to 6.3). Removal of gravel by trucks cannot begin until 9 a.m., after the children are in class. The evidence shows that Mr. Kynock has an extensive trucking operation opposite the quarry site and that the truck traffic would not be significantly greater than when he was allowed to use slate rock for aggregate. Paragraph 6.5 of the development agreement requires the appellant to obtain the approval of the county engineer on the method of dust control. Paragraph 6.6 provides: "the crusher shall be operated in a manner that is not obnoxious to surrounding properties in terms of noise and dust in accordance with the Department of the Environment's "pit and quarry guidelines. Paragraph 8.6 provides that vegetation shall not be removed within a distance of 500 feet from the active quarry site or from the edge of Masons Mill Pond Brook. This provides a buffer between the quarry site and the school. Paragraphs 9.9 and 9.10 require dust monitoring stations on site and require monthly reports from a professional engineer certifying dust levels are within the range permitted by Paragraph 9.8. Paragraph 9.11 requires noise levels to be monitored. Part 10 of the development agreement deals with safety; the appellant cannot store any explosives or blasting caps on the property. He shall secure the boundaries of the active quarry site by either reducing the slope of the work face and the walls of the quarry to one to one, horizontal/vertical or by fencing the area above the active pit face completely. He shall take necessary precautions to ensure public safety, including posting of necessary signs. He shall construct a gate on the access road at the entrance from the Hammonds Plains Road. The gate shall be kept closed and locked except when operating. Pursuant to Part 11, which deals with "access roads and trucking," clause 11.8 requires the appellant

to inspect all trucks carrying crushed rock leaving the property for loose rocks and to ensure that all loads are covered, stabilized and secure. The appellant is required to treat the access road with dust control measures on a regular basis.

Part 14 of the development agreement deals with "Implementation" and contains numerous provisions to secure the proper operation of the quarry including the right of the Council by resolution to terminate the development agreement if the appellant breaches its terms. I would note that under Part 3 "General Requirements" paragraphs 3.1, 3.2 and 3.4 provide significant obligations on the appellant; he must comply with all the requirements of the land use by-law for the District. Perhaps of most significance the quarry developer is bound by all laws of the municipality as well as any applicable statutes and regulations of the Province of Nova Scotia and he must assume full responsibility for meeting all obligations and financial liabilities required to meet all federal, provincial or municipal regulations, by-laws or codes. Pursuant to Clause 14.5 all monitoring and test results shall be certified by an engineer before being submitted to the County Engineer. In addition, there is extensive legislation regulating the operation of quarries and undertakings that impact on the environment. All these provisions of the development agreement have regard to the proximity of the school and the need to control noise, dust levels, truck traffic and ensure the site is safe. It would seem that the essential problem is that the school is situate on what is becoming a somewhat heavily travelled highway and classrooms lack adequate ventilation requiring the windows to be open from time to time. The Hammonds Plains Road is not a street in a residential subdivision but a main traffic artery that passes through an area of mixed uses. The Board focused on the concerns of some residents when it should have focused on the relevant policies and whether the decision to enter the development agreement was reasonably consistent with the intent of those policies.

The third reason given by the Board for deciding to reverse the decision of Council is contained at page 30 of its decision where the Board stated:

> " The adequacy of the road network, traffic, the difficulty of monitoring the operation and general concerns about quarries including noise, dust, potential damage to wells and homes and the ability of County staff to effectively administer the proposed development agreement are all matters which Council must take into account. When they are coupled with the geological conditions and the proximity of the school, the proposed development is not consistent with the intent of the M.P.S. The Board had the benefit of expert evidence which Council did not have. The Board has reviewed Council's decision in light of this additional evidence."

Again, and with respect, it is my opinion that on these matters as well the Board misunderstood its role. The difficulty of monitoring the operation of the quarry and whether the staff has the ability to effectively administer the proposed agreement were irrelevant to the issues before the Board. There may be concerns at a later date if the County staff responsible to see that the quarry is being operated properly are not doing their job, but these speculative considerations by the Board were not relevant in determining if the decision of the Council was reasonably consistent with the intent of the policies.

Part 7 of the development agreement has detailed requirements with respect to blasting including the specific requirement that the techniques used meet the Department of Labour requirements; there was evidence before the Board that the Department has assumed responsibility in this area. Part 7 requires the appellant to cause a pre-blast survey of homes in the area to be done and requires that the appellant have public liability insurance coverage. Thus, the development agreement provides a means to protect homeowners from damage to wells and homes should this occur. Part 7 sets out the limits on the blasts tied to measurable standards with respect to concussion and ground vibration. The operator is required to check on weather conditions when blasts are planned; a blast is to be delayed in the event of unfavourable weather conditions.

With respect to the issue of dust, the development agreement provides in Parts 6 and 9 for extensive controls respecting the operation of the crusher. Part 6.6 provides that the crusher shall be operated in a manner that is not obnoxious to surrounding properties in terms of noise and dust and shall be operated in accordance with the Department of Environment's pit and quarry guidelines.

Even though these guidelines are not enforceable provincial regulations, a breach of them is a breach of the development agreement and Council could terminate the development agreement pursuant to Part 14 if the guidelines are not followed. I have previously set out the requirements of the development agreement respecting dust monitoring.

In my opinion, even assuming that "the concerns" of the Board are matters for Council rather than the Department of the Environment, the Council did take these matters into account and provided reasonable controls in the development agreement to deal with these potential problems. These controls meet the requirements of Policy P-121(c) to reduce conflicts between the quarry operation and nearby land uses. All matters of planning concern relevant to thequarry operation are addressed in the development agreement.

The development agreement is full of safeguards with respect to the operation of the quarry including the right of the Council to terminate the development agreement if the terms are breached. The obligation on the appellant are extensive; every aspect of the operation is subject to control by the municipality pursuant to the development agreement including the obligation of the operator to comply with all provincial statutes and regulations. It is essential to remember that the planning policies permit quarries to be developed or expanded in District 18 by use of development agreements so long as the Council, in agreeing to enter an agreement which would allow the quarry operation, has appropriate regard for the relevant policies for the District.

The Board dealt at considerable length with the fact that a sub-contractor of the appellant had discharged a blast on August 22, 1991, one day after the blasting permit had expired. The appellant had been given permission to do this blast to generate rock for a road, ditch and settling ponds. The blast was overseen by a consulting firm. The blast had been triggered electronically as opposed to a recommendation from the Nova Scotia Power Corporation that a non-electrical blasting technique be used. The Board was concerned that as this blast had not been properly monitored that blasting in the future would not be properly monitored. The Board stated at p. 16 of its decision:

> " The Board believes that this incident and the follow-up by the County are both matters which must be considered by the Board in assessing the proposed development agreement and in reviewing Council's decision."

In my opinion that was an irrelevant consideration on the issue before the Board; the incident had nothing to do with whether the decision to enter into the development agreement was reasonably consistent with the intent of the relevant policies.

The extent to which the Board got into the details of how the quarry was to operate and the extent to which it speculated in arriving at its decision to reverse Council is evident from the following statement made in its decision at p. 17:

> " As noted earlier, the proposed development agreement calls for monitoring by both the Applicant and the County. In addition, a number of permits must be obtained and renewed each year. Donald Mason, a planning consultant, as part of his evidence on behalf of the Applicant prepared a Flow Chart, Exhibit B-93, of the various permits and monitoring which the proposed development agreement calls for. It is not clear if the Flow Chart has captured everything. For example the Flow Chart does not take into account any requirements under the Metalliferous Mines and Quarries Regulation Act. In any event the process shown is so detailed that it is quite likely that important items will be overlooked.
>
> The Board doubts that the County has sufficient staff to monitor this one development to the extent that the agreement calls for...."

The foregoing quotation from the Board's decision shows that it went far beyond dealing with the question it was required to answer pursuant to **s. 78** of the **Planning Act**. The Board improperly speculated that monitoring would not be satisfactory; that had nothing to do with the issue before the Board. At the risk of labouring the point, I will cite another indication of the extent to which the Board dealt in irrelevant speculation. After acknowledging that the municipality does have the authority under the terms of the development agreement to discharge the agreement if it is breached and not resolved within 30 days the Board went on to state:

> " This is a drastic remedy and the Board doubts that it would be used for minor or even fairly major breaches."

To a great extent, the Board's decision was based on speculation as to the possibility that Halifax slates might be exposed and cause environmental damage; that the monitoring of the site will not be adequate and that the laws regulating the quarry operation will not be enforced. The Board erred in basing its decision on such speculation.

The Board conducted the hearing and wrote its decision as if the Municipal Council approval was irrelevant to the Board's determination that a quarry should not operate on this site. In so doing the Board exceeded its statutory mandate and its decision must be set aside. Quarry development poses difficult problems for residents living near a quarry and also for municipal councils. However, in this case the policies in the municipal planning strategy permit a quarry operation pursuant to development agreement in this District. Maybe this policy is not appropriate; maybe there should not be any quarries in areas that have a residential component mixed in with business and light industry along a provincial highway but that is not the policy that is in place for this District. It may be that a municipality as large as the County of Halifax with councillors representing such diverse interests as those who represent urban Districts and those who represent strictly rural constituents in the far flung areas of the county is not an appropriate forum to decide whether or not to enter into development agreements in a particular district but that is what the scheme of the **Planning Act** provides. On the other hand, planning policies for each district were developed in consultation with the residents.

The appellant has raised one other issue on this appeal that merits some comment. The Board has a practice of not even requiring parties to advise the other side of the names, qualifications and summary of opinions to be given by expert witnesses they propose to call, let alone deliver expert reports in advance of the hearings. The appellant argues that this results in an unfair hearing. Without deciding that issue, it would seem to me that it would be fairer and make for a more expeditious hearing if the practice were changed. This would not interfere with the Board policy of

allowing citizens to express opinions on the subject-matter before the Board. But where parties are to be faced with expert testimony it would seem appropriate to provide at least some minimum information in advance as to the nature of the testimony to be adduced.

The Council for the Municipality of Halifax had the benefit of the staff report that adequately addressed the issues the Council had to consider in determining whether or not to enter into the development agreement. Council also had the benefit of the views of those in favour and those opposed to the quarry. The Council had the letter from the Department of Environment respecting its assessment of the proposed quarry and had the draft development agreement. The Council, by a margin of 14-2, approved the entry into the development agreement. In dealing with an appeal from a decision of a municipal council the Board must do so in accordance with the existing legislation. The Board appears to have figuratively put itself in the home of a resident on the Hammonds Plains Road and sought out every conceivable reason or speculation as to why a quarry should not operate on this site. While one can appreciate the Board's concerns for the resident it misconstrued its role as a review board. In summary, the Board erred in allowing, considering and founding its decision on irrelevant matters and improper speculation. In particular the Board's decision turned on its concerns about matters that ought to be determined by the Department of the Environment and on assumptions that were not relevant to the issue before the Board. Although the decision was couched in the words of **s. 78(6)** of the **Planning Act**, in reality the Board took upon itself the function of deciding whether or not a quarry should operate on that site. That was not the function assigned to it by the Legislature. In the breadth of the appeal hearing and in its decision to reverse the Council's

decision, the Board misinterpreted the scope of the review power conferred on the it by **s. 78(6) Planning Act**. In so acting the Board exceeded its jurisdiction. Therefore, this Court has a duty to

act; the appeal ought to be allowed and the Board's decision set aside. The appellant should have costs in the amount of $3,000.00 plus disbursements.

Hallett, J.A.

Concurred in:

Hart, J.A.

Matthews, J.A.

C.A. No. 02924

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

VERNON KYNOCK Appellant - and - SHIRLEY BENNETT, TIM BENNETT, WENDY BENNETT, WILLIAM T. BENNETT, PAUL CALNEN, TANYA CALNEN, RANDALL B. COREY, ROXANNE COREY, MIKE D'AMOUR, PAMELA D'AMOUR, BRIAN F.S. DILLON, CAROL DILLON, DOROTHY E. EVANS, JOYCE I. EVANS, KEN FISHER, MARGARET FRASER, DEREK FUDGE, PATRICIA FUDGE, JANE INNES, JIM INNES, PATTI HAMBLEM, CATHERINE HARNISH, STEPHEN HARNISH, DOUGLAS HAVERSTOCK, ELLEN HAVERSTOCK, MABEL (JOYCE) HAVERSTOCK, PETER A. HAVERSTOCK, TIMOTHY HAVERSTOCK, HAROLD A. HILTZ, HAROLD LONG, DONNA MASON, JANICE NEWELL, MICHAEL NEWELL, BETTY RYAN, BETTY LOU SHIELDS, FRANK SHIELDS, JOEY SHIELDS, ROSELINE SHIELDS, BONNIE P. SMITH, GRANVILLE SMITH, LEETA CATHERINE SMITH, LENA SMITH, MARY SMITH, RAYMOND SMITH, THOMAS SMITH, ELIZABETH STACEY, JULIAN STACEY, DIANNE VANVESSEM, BARBARA VERGE, GERALD VERGE, ROBYN WALKER, LAWRENCE WALKER, DEBORAH WELTZ, GERALDINE WELTZ, THOMAS WELTZ, WALTER WELTZ, JENNIFER WOOD, RICHARD WOOD, GARY YOUNG and LYNN YOUNG Respondent	REASONS FOR JUDGMENT BY: HALLETT, J.A.